

HONORABLE BENJAMIN H. SETTLE
HONORABLE MICHELLE L. PETERSON

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ZANE J. KIRBY,

Plaintiff,

v.

McMENAMINS, INC., et al.,

Defendant.

Case No. 3:22-cv-05168-BHS-MLP

**JOINT STIPULATION TO MODIFY
ORDER SETTING PRETRIAL
SCHEDULE**

RECITALS

WHEREAS, on or about February 9, 2022, Plaintiff ZANE KIRBY (“Plaintiff”) filed his Class Action Complaint for Unpaid and Wrongfully Withheld Wages (the “Complaint”) in this action in the Superior Court of the State of Washington in and for the County of Lewis [Dkt. #1-1];

WHEREAS, on March 16, 2022, Defendant McMENAMINS, INC. (“Defendant”) removed Plaintiff’s above-described state court action to this Court [Dkt. No. 1];

WHEREAS, in his Complaint, Plaintiff alleges causes of action against Defendant, an Oregon corporation that is engaged in the food and restaurant industry, for, *inter alia*, failure to compensate for missed meal and rest periods pursuant to RCW 49.12 and WAC 296-126-092, which allegations Defendant denies;

WHEREAS, on May 19, 2022, this Court issued its Order Setting Pretrial Schedule, which included, *inter alia*, an April 10, 2023 “[d]eadline for Plaintiff to file Motion for Class Certification and Report of Class Certification Expert”, with a note that “[t]his deadline can be extended for good cause pursuant to LCR 23(i).” [Dkt. No. 12]. The Court’s Order Setting Pretrial Schedule also includes a May 8, 2023 deadline for Defendant to file its Opposition to Plaintiff’s Motion for Class Certification, and a July 15, 2023 deadline for discovery to be completed by. *Id.*

WHEREAS, since the Court’s issuance of the Order Setting Pretrial Schedule, the parties have worked diligently towards completing discovery and preparing for class certification briefing;

WHEREAS, on May 26, 2022, Plaintiff propounded a first set of written discovery requests consisting of Interrogatories and Requests for Production of Documents to Defendant, and Plaintiff also simultaneously provided Defendant with a Notice of Deposition of Person Most Knowledgeable at McMenamins, Inc., which included eleven deposition subjects for Defendant’s Rule 30(b)(6) designee(s);

WHEREAS, on June 30, 2022, Defendant served Plaintiff with its Objections, Answers, and Responses to Plaintiff’s first set of written discovery requests. Defendant also produced 149-pages of responsive documents to Plaintiff on July 1, 2022;

WHEREAS, on July 19, 2022, Plaintiff’s counsel sent Defendant’s counsel a Meet & Confer

1 letter alleging deficiencies in Defendant's responses to Plaintiff's first set of written discovery;

2 **WHEREAS**, on August 16, 2022, Plaintiff's counsel and Defendant's counsel engaged in a
3 thorough meet and confer conversation via telephone regarding the deficiencies in Defendant's
4 responses to Plaintiff's first set of written discovery, in an effort to eliminate the need for Plaintiff to
5 file a motion to compel discovery. Through the meet and confer process, the parties worked
6 cooperatively to agree on a modified discovery plan that is manageable, and Defendant agreed to
7 produce to Plaintiff specific discovery documents and class data relevant to Plaintiff's forthcoming
8 motion for class certification, including, *inter alia*: a class list (with a random sample of 15% of the
9 class members' contact information); all applicable compensation policies and meal and rest period
10 policies; a random sample of 15% of the class members' timecard or time-clock records; and a
11 random sample of 15% of the class members' wage statements;

12 **WHEREAS**, during the August 16, 2022 meet and confer conversation, Defendant's counsel
13 informed Plaintiff's counsel that Defendant was the victim of a ransomware attack in December 2021
14 which destroyed many of its records, including its historical electronic timecard and payroll records.
15 Specifically, on December 12, 2021, Defendant suffered a ransomware attack and cybercriminals
16 gained access to the company system and installed malicious software. As a result, most electronic
17 documents, including related to Plaintiff, were destroyed. Defendant's counsel informed Plaintiff's
18 counsel that while Defendant does maintain physical timecard and payroll records, the process for
19 compiling, analyzing, and producing responsive documents is laborious and time-consuming.
20 Therefore, the Parties are, and have been, working diligently together to identify solutions to produce
21 documents and information responsive to Plaintiff's discovery requests;

22 **WHEREAS**, counsel for the parties continued to correspond via email in September 2022
23 regarding the aforementioned outstanding discovery production, including hardcopy and electronic
24 documents. On September 30, 2022, Defendant produced additional responsive documents to
25 Plaintiff and Defendant's counsel informed Plaintiff's counsel that they are still reviewing a large
26 volume of hardcopy documents, which they anticipated would be ready for production later in 2022.
27 The parties also agreed upon a random sample method;

1 **WHEREAS**, on December 15, 2022, Defendant produced timeclock records for Plaintiff, and
2 Plaintiff's counsel and Defendant's counsel continued to correspond and meet and confer in January
3 2023 regarding outstanding discovery documents, including the class list and a randomized sample
4 of timecard and wage statement records of the putative class members;

5 **WHEREAS**, On January 20, 2023, Defendant served Plaintiff with its Objections to
6 Plaintiff's Notice of Rule 30(b)(6) Deposition of Person Most Knowledgeable at McMenamins, Inc.
7 and requested that the parties meet and confer. Defendant's counsel also informed Plaintiff's counsel
8 that Defendant is still working on producing outstanding discovery. On January 26, 2023, Plaintiff's
9 counsel and Defendant's counsel engaged in a thorough meet and confer conversation via telephone
10 regarding Plaintiff's Rule 30(b)(6) topics, as well as the aforementioned outstanding discovery
11 productions, including the class list and a randomized sample of timecard and wage statement records
12 of the putative class members;

13 **WHEREAS**, On January 30, 2023, Defendant produced additional documents to Plaintiff,
14 including an anonymized class list and a 15% sample class list with putative class members' names,
15 but with no contact information. On February 2, 2023, Plaintiff's counsel emailed Defendant's
16 counsel regarding outstanding discovery productions, including a 15% sample class list with contact
17 information and random samples of the putative class members' timecard and wage statement
18 records. Plaintiff's counsel and Defendant's counsel have continued conferring in February and
19 March 2023 regarding outstanding discovery productions, and regarding jointly requesting that this
20 Court modify the Order Setting Pretrial Schedule, especially due to the difficulties Defendant has had
21 producing physical records as a result of the ransomware attack it was subjected to;

22 **WHEREAS**, the Parties have discussed the possibility of engaging in settlement discussions,
23 and those conversations are ongoing;

24 **WHEREAS**, the Parties agree that additional time is needed to complete written discovery
25 and depositions relevant to Plaintiff's forthcoming motion for class certification, and Defendant's
26 opposition to the same;

27 **WHEREAS**, there is good cause to modify the Order Setting Pretrial Schedule to allow the

parties to complete written discovery, take depositions, including Defendant's Rule 30(b)(6) deposition, and for Plaintiff to brief his motion for class certification;

WHEREAS, Fed. R. Civ. P. 16(b)(4) and LCR 16(b)(6) authorize a court to modify a case schedule order "for good cause and with the judge's consent." *See also* Order Setting Pretrial Schedule, Dkt. No. 12, which provides that Plaintiff's deadline to file his motion for class certification "can be extended for good cause pursuant to LCR 23(i)." "Good cause considers the diligence of the parties seeking the modification; a district court may modify the pretrial schedule 'if it cannot reasonably be met with the diligence of the party seeking the extension.'" *Advanced Hair Restoration, LLC v. Hair Restoration Ctrs., LLC*, 2017 U.S. Dist. LEXIS 101180, at *2 (W.D. Wash. June 29, 2018) (citing *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992)). "Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification." *Fox v. State Farm Ins. Co.*, 2016 U.S. Dist. LEXIS 9056, at *4 (W.D. Wash. Jan. 26, 2016).

WHEREAS, the parties have acted with diligence in trying to adhere to the current Order Setting Pretrial Schedule deadlines, including through several months of discovery-related meet and confer efforts, but are jointly requesting a 120-day extension to the forthcoming deadlines in the Order Setting Pretrial Schedule so that: (a) Defendant can produce to Plaintiff remaining outstanding discovery documents and class data; (b) Plaintiff can take Defendant's Rule 30(b)(6) deposition; and (c) Defendant can depose Plaintiff; and (d) Plaintiff can brief his motion for class certification. The parties agree the current Order Setting Pretrial Schedule is no longer suitable due to unique circumstances out of the Parties' control, and specifically due to the difficulties Defendant has had producing physical records as a result of the ransomware attack it was subjected to, but that a modified case schedule that provides a 120-day extension to the forthcoming deadlines in the Order Setting Pretrial Schedule would allow the parties to complete discovery relevant to Plaintiff's forthcoming motion for class certification, and may also assist the Parties in resolving the case. Accordingly, the Parties agree that modifying the Order Setting Pretrial Schedule and its forthcoming deadlines as

requested herein would be prudent and efficient for both the Court and the parties;

WHEREAS, neither party will be prejudiced by the requested modification of the Order Setting Pretrial Schedule and related deadlines; and

WHEREAS, this is the first time the parties have asked the Court to modify the Order Setting Pretrial Schedule.

JOINT STIPULATION

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between Plaintiff, on the one hand, and Defendant, on the other hand, by and through their respective undersigned counsel, and subject to the Court's approval, that the deadlines in the Order Setting Pretrial Schedule set forth by the Court (Dkt. No. 12) shall be modified as follows, or set on such other dates as the Court determines:

EVENT	DATE
Deadline for Plaintiff to file Motion for Class Certification and Report of Class Certification Expert. (This deadline can be extended for good cause pursuant to LCR 23(i).)	August 8, 2023
Deadline for Defendant to file Opposition to Plaintiff's Motion for Class Certification and Report of Class Certification Expert	September 5, 2023
Deadline for Plaintiff to Reply re: Motion for Class Certification	September 19, 2023
Reports of expert witnesses under FRCP 26(a)(2) due	October 9, 2023
All motions related to discovery must be filed by this date and noted for consideration no later than the third Friday thereafter (<i>see</i> LCR 7(d))	October 9, 2023
Rebuttal expert disclosures under FRCP 26(a)(2) due	November 13, 2023
Discovery to be completed by	November 13, 2023
All dispositive motions and motions to exclude expert testimony for failure to satisfy <i>Daubert</i> must be filed pursuant to LCR 7(d)	December 11, 2023

DATED: March 28, 2023

/s/ Brian Denlinger

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PROPOSED ORDER

This matter came before the Court on the Parties' Joint Stipulation to Modify Order Setting Pretrial Schedule (the "Joint Stipulation"). The Court, having reviewed the Joint Stipulation, and good cause appearing for the relief sought therein, hereby orders that the deadlines in the Order Setting Pretrial Schedule set forth by the Court (Dkt. No. 12) shall be modified as follows:

EVENT	DATE
Deadline for Plaintiff to file Motion for Class Certification and Report of Class Certification Expert. (This deadline can be extended for good cause pursuant to LCR 23(i).)	August 8, 2023
Deadline for Defendant to file Opposition to Plaintiff's Motion for Class Certification and Report of Class Certification Expert	September 5, 2023
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IT IS SO ORDERED.

DATED this 29th day of March, 2023.



MICHELLE L. PETERSON
United States Magistrate Judge